Filed 6/20/19 P. v. Villa CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LUIS ADOLFO VILLA, Defendant and Appellant.	A152278 (San Mateo County Super. Ct. No. SC071801-A) **ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT**

THE COURT:

It is ordered that the opinion filed herein on May 31, 2019, be modified as follows:

On page 41, delete the second full paragraph (excluding fn. 26) under the heading "**B.** ***Legal Analysis***," and replace it with the following paragraph:

Here, the jury in the prior case made no specific finding on the verdict form for the negligent discharge of a firearm count as to whether appellant had personally used a firearm and the trial court in this case apparently based its personal use finding on evidence from the record of the prior jury trial. It thus "determine[d] disputed facts about what conduct likely gave rise to the conviction" in finding true the prior serious felony and strike allegations, which is no longer permitted. (*Gallardo*, *supra*, 4 Cal.5th at p. 138.) Because the court's determination violated the rule set forth in *Gallardo*, the matter must be remanded for a new determination on the prior conviction allegations, based only on facts from the record in the prior trial that "were already necessarily found by [the] prior jury in rendering a guilty verdict" on the negligent discharge of a firearm count. (*Id*. at pp. 124, 138.)[26]

Footnote 26 is not changed and should remain at the end of the paragraph after the citation.

The petition for rehearing is denied. There is no change in judgment.

Dated: _____ _____

Kline, P.J.

Filed 5/31/19 P. v. Villa CA1/2 (unmodified opinion)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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THE PEOPLE, Plaintiff and Respondent, v. LUIS ADOLFO VILLA, Defendant and Appellant.	A152278 (San Mateo County Super. Ct. No. SC071801-A)

Appellant Luis Villa appeals after a jury found him guilty of second degree murder, following his second jury trial in this case. On appeal, appellant contends (1) the trial court erred when it failed to instruct the jury sua sponte that the testimony of an accomplice should be viewed with caution; (2) the court erred when it admitted a witness's testimony that appellant's father had told him to keep silent about the killing; (3) the court erred when it instructed the jury with CALCRIM No. 3551 after the jury said it was deadlocked; (4) the court's findings on allegations related to his prior conviction should be reversed and remanded for resentencing pursuant to subsequent California case law; and (5) his conviction should be reversed due to cumulative error. We shall reverse the prior conviction findings and remand the matter for a new court trial on the prior conviction allegations and for resentencing, but shall otherwise affirm the judgment.

PROCEDURAL BACKGROUND

In the first trial,[1] appellant was charged by amended indictment with the first degree murder of Matthew Johnson (Pen. Code, § 187, subd. (a).)[2] The indictment alleged that appellant personally used a deadly weapon, a knife, in the commission of the offense (§ 12022, subd. (b)(1)); that he personally and intentionally inflicted great bodily injury on the victim (§ 1203.075); and that he was at least 16 years old at the time of the offense (Welf. & Inst. Code, § 707, subd. (d)(1)).[3] The indictment also alleged that appellant had suffered a prior conviction for negligent discharge of a firearm (§§ 246.3, 969f), which constituted a serious felony within the meaning of section 667, subdivision (a)(1) and a prior strike conviction within the meaning of section 1170.12, subdivision (c)(1), and for which he had served a prison term (§ 667.5, subd. (b)).

On December 15, 2011, a jury found appellant guilty of second degree murder and found the related enhancement allegations true. On March 2, 2012, the court found the prior conviction allegations true. On November 30, 2012, the court sentenced appellant to 36 years to life in prison.

On appeal, we reversed the judgment after finding that appellant was prejudiced by his attorney's failure to object on the ground of hearsay to the admission into evidence of packing slips showing his purchase of two knives. (*People v. Villa*, *supra*, A137247.)[4]

On February 15, 2017, following a second jury trial on one count of second degree murder, a jury again found appellant guilty of second degree murder and found true the deadly weapon and age allegations. On April 13, 2017, the court found true the prior serious felony, prior strike, and prior prison term allegations.

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[1] The background related to the first trial is taken from our opinion in appellant's first appeal. (See *People v. Villa* (Jan. 7, 2015, A137247) [nonpub. opn.].)

[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] Appellant was three weeks shy of his 18th birthday at the time of the offense.

[4] On March 19, 2018, appellant filed a request for judicial notice of the record in the first appeal, pursuant to Evidence Code section 452, subdivision (d)(1). Because the record from the prior appeal is unnecessary to our resolution of the issues raised on appeal, we now deny the request for judicial notice.

On August 24, 2017, the court sentenced appellant to 36 years to life in prison. On August 31, 2017, the court recalled the sentence pursuant to section 1170, subdivision (d), and resentenced appellant to a term of 35 years to life in prison, staying the previously imposed one-year deadly weapon enhancement.

On September 5, 2017, appellant filed a notice of appeal.

FACTUAL BACKGROUND

Prosecution Case

Robert S., who was 23 years old at the time of trial, testified that he had been good friends with the victim, Matthew Johnson, since they were in sixth grade. In the early morning of January 3, 2009, when Robert was 15 years old, he was with Johnson and another friend, Steven M. The three boys stole a six-pack of soda from the loading dock of a Safeway store in Redwood City and walked along some train tracks toward an overpass above Jefferson Street. They then threw four or five sodas off of the overpass; none of the cans hit any vehicles on the road below. Next, they began throwing rocks that were about five inches across off of the overpass, trying to hit the cars down below.[5] After about a minute of throwing rocks, Robert heard two rocks make contact with a car. The car, an orange or reddish compact, turned left onto Franklin Street.

The three boys had started to run down a hill when Robert saw a man in a light gray shirt rounding the corner at the top of the hill.[6] The boys ran through a gap in a fence and through a parking lot. Robert heard the man in the gray shirt yelling, " 'Get back here, mother fucker.' " They then saw the car they had hit with the rocks stop and its doors open on Wilson Street. The boys ran towards Franklin Street and Robert then ran to another parking lot at Franklin and Monroe Street. He and Johnson hid in some bushes in the parking lot. There were not many street lights around and it was fairly dark.

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[5] Robert acknowledged originally not telling police that the three boys had been throwing rocks at cars.

[6] The man in the gray shirt was identified by other witnesses at trial as appellant.

Robert saw the same car drive up and then heard the man in the gray shirt say to turn left. Johnson fell over and the man in the gray shirt heard the bushes rustle. Robert heard the man say, "Gordo," and " '[t]hey're over here.' " The man in the gray shirt ran over and pulled Johnson out of the bushes; Robert did not see a knife in the man's hands. Robert saw Johnson fall down on his side or back. He then saw four or five more people enter the parking lot, running from the corner where the car was parked.[7]

Robert, who was still hiding in the bushes, was terrified. He was looking into the parking lot and, although his view was somewhat obstructed by the branches, he saw all of the men circle Johnson and start beating him. They were 5 to 10 feet away from where Robert was hiding and he saw they were "all moving around kicking and making "downward punching motions." He did not see a weapon in anyone's hand. He heard Johnson say he "didn't do it." Johnson was also screaming. Robert heard the attackers saying things in English, but he did not recall what they said. He did not hear anyone speaking Spanish. Robert saw that the person in the gray shirt was participating in the punching and kicking, but he would not be able to point out that man or anyone else in the courtroom. He recalled that one of the men—the one they called "Gordo"—was wearing a San Francisco Giants jacket, but he could not tell if Gordo was part of the group attacking Johnson.[8] Nor did he see if a man in a purple shirt was participating in the attack.[9] He did not see any of the men try to prevent anyone else from hitting Johnson. He did not hear anyone say, " 'No. Stop.' "

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[7] Robert acknowledged telling a detective on January 3, 2009, that the second man to enter the parking lot after Johnson was thrown to the ground, was wearing a black hoodie.

[8] Robert did not recall telling a detective in a January 3, 2009 interview that Gordo arrived " 'a couple of seconds before I got kicked in the face,' " and that " '[h]e runs in and started kicking [Johnson] in the back.' " After looking at the transcript of the interview, Robert acknowledged saying that to the detective. He also acknowledged testifying to that effect in November 2011. In the January 2009 interview, Robert also said the man in the gray shirt looked around 17 years old, a little younger than Gordo.

[9] Robert was shown a picture of a man in dark blue or purple clothing, who he did not remember seeing that night. Other evidence admitted at trial demonstrated that the

The attack on Johnson lasted less than a minute. After the men finished the attack and started to leave, the man in the gray shirt turned and saw Robert in the bushes.[10] The man approached him and kicked him twice, including once in the face. This attack on him lasted a minute or two. He noticed the bottom of the man's shoes, which "looked exactly like Nike Cortez, which are mostly black, with white laces and a white swish, and with ridged white foam on the bottom."[11] At the trial, Robert identified a man in a surveillance photograph as the man in the gray shirt who had kicked him.

After the attack ended, Robert climbed out of the bushes and saw Johnson standing up. All of the men were out of the parking lot by then except the man in the gray shirt who turned around, came back to Johnson, and yelled at him for his wallet, saying, " 'No. Fuck that. Give me your wallet.' " Johnson said he did not have a wallet and the man turned and ran back toward the car with the other men. Robert did not see a knife in the hand of the man in the gray shirt at that point, although he was not looking at the man's hands. Nor did he see that man or any of the other men holding a knife at any time that night. However, he was unable to see anyone's hands while they were actually making contact with Johnson.

Johnson told Robert he was bleeding; Robert said he knew because he saw blood coming out of Johnson's nose. Johnson said, "no, he had been stabbed" and pointed to his ribs. When Robert put his hand on Johnson's ribs, blood squirted through Johnson's jacket and onto his hands. Robert threw Johnson's arm over his shoulder and began to walk back toward Safeway. When they came to another parking lot, Johnson said he could not walk anymore. Robert lay him down and ran to the next street yelling for

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man in the blue or purple shirt was appellant's cousin Luis Herrera in his McDonald's uniform.

[10] It could also have been the tail end of the assault on Johnson when the man in the gray shirt turned to Robert, "[b]ut by the time he was done kicking me, they were all pretty much leaving the parking lot."

[11] The prosecutor showed Robert a shoe at trial, which had a bottom that was half black and half translucent yellow colored, and which Robert said did not look like the shoe that kicked him.

Steven M., who came running over. Robert left Steven M. with Johnson and ran to a nearby donut shop, where he called the police.

Jonathan Herrera (Jonathan),[12] who is the younger brother of another witness, Luis Herrera, testified that he is appellant's first cousin. He was close to appellant growing up in Redwood City, when they went to middle school together. While Jonathan was still in middle school, appellant and his family moved to Lathrop. After that, he saw appellant twice a year, during holidays. In 2009, Jonathan still loved and felt close to appellant. Jonathan had another cousin named Uriel Villa, with whom he grew up and who he saw almost every day in 2009. In January 2009, Jonathan was living in Redwood City with his mother, his father, his brother Luis, his brother's then girlfriend, and his brother's baby. Appellant began staying at Jonathan's house right after New Year's. Jonathan was fluent in both English and Spanish. He spoke Spanish with Luis, Uriel, and appellant. Jonathan had a nickname: Gordo.

In 2009, Jonathan's mother had a red Honda Civic, which Jonathan regularly drove. On the afternoon of January 2, Uriel came over to Jonathan's house, and Jonathan, Uriel, and appellant spent time together. Later that night, Jonathan drove his two cousins in the red Honda Civic to a McDonald's in Redwood City, to pick up Luis from his work shift. Uriel was seated in the front passenger seat and appellant was in the rear passenger seat. When they picked up Luis, he got into the rear driver-side seat.

Jonathan then started driving to Safeway. As he drove under an overpass, he heard two "pop" noises. He thought he might have run over a bottle, so he turned left and then stopped the car to check for a flat tire. Luis then said, " 'Somebody is throwing rocks,' " which made Jonathan mad. Luis and appellant got out of the car and ran toward the overpass. Jonathan then began driving and turned left on Wilson Street where he remembered there being a walkway. He thought he could block the people who threw the rocks. He parked the car at the dead end, got out, and walked a short way until he saw

[12] Several of the witnesses at trial had last names in common with each other or with appellant. We will therefore refer to those witnesses by their first names.

people running. He went back to the car, made a U-turn, and drove back to Franklin Street, where he turned left.

Jonathan then saw Luis walking on the sidewalk, with appellant just behind him. Appellant was wearing a gray shirt with an orange logo on it, which he had borrowed from Jonathan. Luis was wearing his McDonald's uniform, which included a blue shirt. Jonathan drove up to them and Luis pointed to some bushes in a parking lot on the corner of Franklin and Monroe. Jonathan was driving slowly by when he heard someone scream. He stopped the car, told Uriel to park, and got out.

Jonathan ran toward the parking lot, where he saw somebody—who he later learned was Johnson—on his knees on the ground. Appellant was to the left of Johnson and Luis was next to the bushes. Jonathan saw appellant take off the gray shirt; he had a white tank top on underneath. Jonathan, who was angry, approached Johnson and grabbed his shoulders to see who he was and if he knew the person. When Jonathan saw Johnson's face, "he kind of looked really young." About two seconds later, Jonathan heard appellant say in Spanish "to move. He was going to stab him." Jonathan moved his hand to the left, toward where appellant was standing, without knowing "if it was to push him or block. I just remember I moved my hand to the left and I got stabbed" in the hand. He jumped back and looked at his hand before looking back toward appellant, around 10 seconds later.

This was when Jonathan saw appellant stabbing Johnson around three times on the left side of his torso, using an underhand motion. Johnson was on his hands and knees and was screaming. Jonathan was about 10 feet away at that point. Neither he nor anyone else present told appellant to stop and he never grabbed appellant in a bear hug. Luis was in the same area he was in when Jonathan arrived and "was swinging at somebody" in the bushes. It was dark in the parking lot, but there was a little bit of light.

After Jonathan was stabbed, Uriel came up and was standing in the middle of the street. Uriel said, " 'Gordo, let's go,' " in Spanish. Jonathan then told his brother Luis, "Luis, let's go,' " in Spanish. Jonathan started running toward the car and got into the front passenger side seat. Uriel was the driver. Luis got into the car on the left rear side,

behind the driver's seat.[13] Jonathan then saw appellant go back toward the parking lot; he thought appellant had forgot something. He was gone for 10 or 15 seconds before returning to the car and sitting in the right rear passenger seat. As they drove away, Jonathan looked back at the parking lot and saw Johnson running.

While they were driving to Uriel's house, Jonathan turned around and saw appellant closing a folding knife with a black handle and a silver blade that was three or four inches long. Appellant "was bragging about" what had happened, asking if Jonathan had heard Johnson " 'crying like a little bitch.' " Appellant also said he had stabbed Johnson " 'hella times.' " Appellant did not sound upset when he spoke. Jonathan "was a little mad and upset," and "a little scared" "[a]bout being stabbed; getting in trouble." Jonathan had been in fights before, but never any involving weapons. Luis asked appellant " 'Why did you do that?' " and appellant did not respond. Then Jonathan told appellant he had stabbed Jonathan, and appellant said, " 'Oh sorry. I told you to move.' " Luis then asked again why he had done that, since we " 'usually will just fight with hands right here.' "

After they dropped Uriel off at his house, Luis took over driving them home. Jonathan noticed that his leg was also injured, in the shin area below his knee. When they got home, he, Luis, and appellant went inside. They went into the bedroom of Janet Campos, Luis's girlfriend, and Jonathan heard appellant say "that they were jumping [him] and he stabbed somebody." Jonathan decided to go to the hospital because he was in pain. Appellant said not to go because the police were going to ask questions. Jonathan went anyway, and got stitches in his hand and some powder on his leg. He got home from the hospital between 5:00 and 6:00 that morning. Appellant was just leaving in a black car after one of his sisters picked him up.

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[13] Jonathan noticed that Luis did not have his McDonald's shirt on anymore, and was wearing a tank top. He had the McDonald's shirt with him though. Jonathan had seen people take off their shirts before a fight so that the person they're fighting will not grab their shirt.

Later that same day, January 3, 2009, one of Jonathan's friends told him that somebody had gotten killed near Safeway. Jonathan could not believe it. It was "[l]ike, your life is just, you know suddenly dark." He felt a sense of responsibility for what had happened because he stopped the car, and felt regret for doing so. Jonathan had no idea that appellant was going to stab Johnson during the incident.

Appellant called Jonathan and asked if somebody had died, and Jonathan said yes. Appellant then said he wanted to go to Mexico. Jonathan said he did not want to go to Mexico. He did not want to go because he felt like he had not done anything wrong. Appellant "said that they were going to pin [the murder] on me [(Jonathan)] if I got caught," which scared Jonathan. He therefore decided to go to Mexico, specifically to Uruapan in Michoacán, where his family was from. Jonathan later told Luis that someone had died and Luis "went crazy. . . . He started crying and running out of the house and coming back in." They discussed going to Mexico. Jonathan also talked to Uriel, who sounded upset and said he wanted to go to Mexico too.

Jonathan, appellant, Luis, and Uriel left for Mexico within a few days of the stabbing. Appellant's sister Carina first drove Jonathan, appellant, and Uriel to the home of Jonathan's aunt in Gilroy. Appellant's father was also there, and Luis and Campos met them at the house. While in Gilroy, appellant asked whether Jonathan had the clothes he wore "from the scene" with him and he said yes, he had the pants with him. Appellant examined the pants and found the hole in the leg where Jonathan had been stabbed. Appellant ripped the pants and said he was going to burn them. During their conversation, Jonathan noticed that appellant had a knife in his hand that looked like the knife he had after the stabbing. Appellant then took Jonathan's pants into the backyard.

While they were at his aunt's house in Gilroy, Jonathan's uncle—appellant's father—told Jonathan "not to tell anybody about what had happened" and that appellant "is like my brother; that I shouldn't say anything to anybody about what had happened." These comments "[m]ade [Jonathan] feel pressured." Jonathan felt scared about going to Mexico and did not want to go, but he "felt like it was the only way out of everything."

Jonathan then rode in the red Civic with Luis, Campos, appellant, and appellant's sister, Jasmine, to Lathrop, where appellant lived. Jasmine then drove Jonathan, Luis, and appellant to Mexico. During the car ride, Luis asked appellant more than once, "why did he do it," and said " 'that his [Luis's] life was fucked up.' " Luis sounded sad. Appellant apologized and " 'said he didn't mean to.' " During the drive, they stopped at a gas station and met up with Uriel, who was with his mother and father. They spent the night at Campos's home in Palm Springs before again meeting up with Uriel and his family at a hotel in Los Angeles. Uriel's father, Uriel Villa, Sr. (Uriel Sr.), was "sad with" all of the cousins.

The next day, Jonathan, appellant, Luis, Uriel, and Uriel Sr. crossed the border together, from San Diego into Tijuana, Mexico. Luis went back to the United States with Uriel Sr. While at the airport in Tijuana, Jonathan asked appellant "why did he had done it [*sic*] and he just said that he first told me sorry and he was just happy about it. He didn't have any emotions." He seemed like "he was already okay with it." Jonathan, appellant, and Uriel took a plane to Michoacán. Jonathan's aunt picked him up at the airport, and Uriel's grandmother picked him up. Someone also picked up appellant, and the three of them went their separate ways.

That same day, Jonathan's mother called him in Uruapan, where he was staying, and asked him to return to the United States. He agreed to do so. He talked to Uriel, and six days later, Jonathan and Uriel returned together to the United States. Uriel Sr. picked them up at the airport in Tijuana and drove them back to Redwood City.

On January 13, 2009, Jonathan met with Redwood City Police Detective David Cirina. Jonathan did not tell the detective that he had gone to Mexico with family members; he said that a friend drove him to Tijuana. He lied because he did not want to get his family, especially appellant's sisters, in trouble. He also lied when he testified before a grand jury in 2010. Jonathan was testifying at trial pursuant to an immunity agreement, which included immunity from prosecution for lying to the grand jury and for his testimony regarding his involvement in the attack.

After returning from Mexico, Jonathan did not speak with Luis until after the interview with Cirina. Subsequently, on March 17 and April 23, 2009, Jonathan and Uriel visited Luis, who was in jail. They did not discuss the homicide during those meetings. Jonathan visited Luis in jail three more times between May and September 2009, and did not discuss the homicide with him. Jonathan testified that he loved Luis and still loved appellant. It was difficult for him to testify against appellant because "[i]t's my family," but he felt it was the right thing to do because "everybody should be punished for their own mistakes."

On cross-examination, Jonathan denied kicking or punching Johnson. Also, during the five days he was in Mexico, he saw Uriel, with whom he was very close, every day. He acknowledged that he did not tell Cirina during their initial interview that he saw appellant with a knife. He said that Uriel had seen the knife.

Uriel, who was 25 years old at the time of trial, testified that appellant is his first cousin. They spent a lot of time together at appellant's house in Lathrop while they were growing up. As they got older, they stopped seeing each other as much. In January 2009, Uriel had not seen appellant for one and a half or two years. Uriel had been close to appellant and still loved him. He was closer to appellant than to Luis, because he was around him more as a child and grew up with him. He was also close to Jonathan in January 2009, and saw him almost every day.

On the night before the January 3, 2009 homicide, when Uriel was 17 years old, he went to Luis and Jonathan's house where he hung out with Jonathan and appellant. Around 1:00 a.m., Jonathan drove them in his mother's Honda Civic to pick up Luis at McDonald's. Uriel described hearing "some loud hits" on the car as they drove under an overpass after picking up Luis. Luis told Jonathan to turn left and then said to stop the car. Luis and appellant got out of the car and started running. He and Jonathan drove until they saw appellant and Luis running. Jonathan then stopped the car, jumped out, and ran toward a nearby parking lot. Uriel could not see into the parking lot because there were bushes and it was "pretty dark."

Uriel got into the driver's seat and moved the car, which Jonathan had left in the middle of the street. After he parked the car around the corner, Uriel heard yelling through the open car windows. He still could not see into the parking lot, but he heard appellant say in Spanish, " 'Watch out. I'm going to stab him.' " He then heard Luis say, " 'don't do that.' " A few seconds later, Uriel heard what sounded "like a kid crying in pain." Uriel was scared. He got out of the car and called to his cousins so that they could leave. He started walking toward the parking lot, but saw that they were already running toward the car. This was about 40 seconds after he heard appellant say he was going to stab someone. Uriel got back into the driver's seat of the car, Jonathan got into the front passenger seat; appellant got into the rear passenger side seat, and Luis was in the rear driver side seat. Uriel drove straight home.

After Uriel drove away from the scene, he saw that Jonathan had a stab wound in his left hand, and was bleeding. He heard Jonathan say, " 'You stabbed me.' " Appellant said, " 'I'm sorry.' " During the drive, Uriel saw appellant through the rearview mirror using his gray shirt to clean a knife with a three-inch blade. The sight of the knife shocked Uriel. Appellant was not wearing the gray shirt at the time, but had on a white tank top. He also heard appellant say, " 'I stabbed him several times,' like in a laughing way," "like if it was nothing." Appellant also said " 'he stabbed him in the leg. That was when he was laughing.' "

Uriel was wearing a blue hoodie at the time of the incident; he did not have the hood up. He never saw Johnson and did not participate in punching him.

The next day, Uriel learned from Jonathan that someone had died, which scared him. He had gone to school with Johnson, but had no idea he was the person who had died until he came back from Mexico. It made him feel especially bad that he knew the victim. He also felt a sense of responsibility because he was there when the killing took place.

When they left to go to Mexico a couple of days after the killing, Uriel traveled to Southern California with his father, mother, and siblings. They stopped at a gas station, where they saw appellant, Jasmine, Luis, and Jonathan, and then spent the night at a

hotel. Uriel's father then took them across the border into Mexico, to buy plane tickets. Luis left the airport with Uriel's father. Uriel then flew with appellant and Jonathan to Uruapan, where Uriel was going to stay with his grandmother. While waiting for the plane, appellant spoke about the stabbing and did not seem upset. Appellant also said he was never going to come back from Mexico.

After two days in Mexico, someone from Uriel's house called and said he needed to return to the United States and speak to the police. He flew back to Tijuana with Jonathan a short time after that phone call. Uriel's father met them at the airport and drove them home. Uriel spoke to Detective Cirina about a day later, on January 13, 2009. He did not talk to Luis before he met with Cirina.[14] He did not tell Cirina that his father had driven him to Mexico because he did not want to get his father in trouble. Nor did he tell the grand jury that he had traveled to Mexico with his family. Uriel was testifying at trial under a grant of immunity. He also received a grant of immunity for his testimony in front of the grand jury and in a 2011 proceeding in this case.

About two weeks after Uriel returned to the United States, appellant called him on his cell phone. Uriel said everything was fine and "he could just come back." Appellant hung up on him.

Luis Herrera, who was 29 years old at the time of trial, testified that in January 2009, he was 21 years old and living in Redwood City with his mother and father; his brother, Jonathan; his ex-fiancée, Campos; and their son. Uriel and appellant are his cousins. Luis was close to appellant in January 2009. They spent a lot of time together growing up and went to the same school for a time during middle school. After appellant and his family moved to Lathrop, Luis saw them less often. Luis was also close to Jonathan and Uriel in 2009.

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[14] Uriel did visit Luis in jail on March 17 and April 23, 2009, but he did not believe they discussed the homicide. He also visited appellant on January 19, 2016, because he had not seen him in years and still loved him. It was hard to testify against appellant because appellant is his cousin.

In January 2009, Luis worked at a body shop in the morning and at a McDonald's at night. He was also on probation after being convicted of felony evading police. He also had convictions from 2006 for misdemeanor battery and felony commercial burglary, as well as a 2009 conviction for felony assault with a deadly weapon based on the incident in this case, for which he served a year in county jail.

Around 1:00 a.m. on January 3, 2009, Jonathan, Uriel, and appellant picked Luis up from McDonald's in Redwood City. Luis was wearing his McDonald's uniform. Jonathan was driving their mother's red Honda. While they were on Jefferson Street in Redwood City, driving under an overpass, something hit the car and made a loud noise. Luis thought someone had thrown a rock at the car. He looked up and saw three people on the overpass. This made him angry, and he said to stop the car. He got out of the car and started running up the hill toward where he had seen the three people. He saw people running down toward the railroad tracks and he ran after them, down Franklin Street. At some point, one of the three people he was chasing ran toward an apartment complex. As Luis continued chasing the other two people, he noticed that appellant was a couple of feet behind him.

At the corner of Franklin and Monroe Streets, Luis lost sight of the two people. He then heard a sound in some bushes that were next to a parking lot and stopped running. A person came out of the bushes, stood up, and said, " 'It wasn't me. It wasn't me.' " Luis went toward him and said, " 'What the fuck were you thinking?' " He threw a punch at the person, aiming for his face, but did not remember actually striking him. Nor did he remember kicking the person.[15] The person took a step or two back and appellant suddenly came running up on Luis's left side and started punching or pushing the person.

Luis then heard a noise and he turned and saw somebody in the bushes. He went to the bushes, grabbed the person who was in them, and tried to pull him out. He did not

[15] Luis acknowledged on cross-examination that he had testified in 2011 that he did kick the person. His memory of what happened was better in 2011 than at the current trial.

remember if he punched or kicked this person. When he looked back, he saw appellant "throwing punches" at the first person, who was below him on the ground. Luis did not see anything, including a knife, in appellant's hands. It was dark in the parking lot and Luis did not see if appellant made contact with the person's body. Luis then saw Jonathan was there and had grabbed appellant, hugging him as he tried to pull appellant off the person. It all happened very quickly, from the moment Luis first heard someone in the bushes to seeing Jonathan grabbing appellant. He did not see Jonathan hit or kick the victim. During the entire incident, Luis did not recall saying anything or hearing Jonathan, appellant, or the person appellant was punching say anything.

After seeing Jonathan grab appellant, the next thing Luis recalled was walking towards the car and opening the driver's side rear door. As he got to the car, appellant walked back to the two people in the parking lot, and Luis heard someone scream, " 'No.' " He did not see anything in appellant's hand or see him strike either person at that point. Jonathan got into the car in the driver's seat and Uriel got into the front passenger seat. Luis got into the back of the car on the driver's side and when appellant returned, he "passed" over Luis and sat in the rear passenger seat. The next thing he remembered was Jonathan saying, " 'My hand is hurting. My hand is going numb.' " Jonathan raised his right hand and said, " 'I think I got stabbed.' " Luis looked over and saw blood on Jonathan's hand.

Luis then noticed appellant holding a knife in his lap. It may have been a folding knife and had a three- or four-inch blade. Luis felt his "gut drop" and he got scared because he had never been in a fight with weapons and he believed appellant had just stabbed somebody. Luis said something like, " 'Hey, what the fuck are you doing? You fucked up my life over [*sic*].' " Appellant responded, " 'Don't worry about it. I got him in the leg.' " When appellant said this, he did not sound upset. He sounded "like a normal person just talking," and he had a smirk or smile on his face. Luis did not remember if he (Luis) was injured or cut during or after the incident.

After dropping Uriel off, Luis drove the rest of them back to his house, where he tried to help Jonathan clean his wound. Campos was at the house, but he did not recall if he told her what had happened.

Luis later read in a newspaper that someone had died in the incident in the parking lot. Luis was scared because someone had died from a fight that involved him. He felt responsible because his actions in getting out of the car led to appellant stabbing someone. The article described four suspects being involved in the attack and Luis believed he would be identified as one of those suspects.

After Luis got home from work, he called Jonathan, who said he was in Gilroy and on his way to Mexico. Because he was scared, Luis grabbed some clothes and left for Gilroy, where his aunt lived. Campos drove him there in the red Honda. From Gilroy, he drove toward Mexico with appellant, his sister Jasmine, and Jonathan. Luis did not recall Campos being with them or discussing the stabbing while in the car with Jasmine, Jonathan, and appellant. After spending the night in Palm Springs, they drove to a hotel where Uriel and his father were staying. Luis did not recall whether he had any conversation about the stabbing in the presence of appellant, Jonathan, and Uriel Sr. Uriel, Uriel Sr., appellant, Jonathan, and Luis then crossed the border into Mexico.

Luis initially planned on staying in Mexico, but he changed his mind because he realized he had his family in the United States and wanted to come back to Campos and his son. Luis therefore returned home with Uriel Sr.

The next morning, police came to Luis's house and arrested him. He initially lied to police, telling officers that he was at work when the incident occurred and not telling them about fleeing to Mexico with other family members. Luis also did not tell the grand jury in 2010 about going to Mexico. He lied because he was afraid of being charged with helping fugitives leave the country. Luis was testifying at trial pursuant to an immunity agreement. While he was in jail after his arrest, Jonathan and Uriel visited him. He did not recall ever discussing the homicide with them during visits.

It was difficult for Luis to testify against appellant because they are cousins and they grew up together, and Luis had viewed appellant as his younger brother.

On cross-examination, Luis acknowledged that Uriel was wearing a hoodie with the hood up at the time of the incident. From a surveillance photo, he also identified the shoes he was wearing that night, which were black with black bottoms. When he saw appellant with the knife in the car, he did not remember him cleaning it and did not remember if he lifted it up. He also acknowledged that when he returned from Mexico, he did not call the police, but decided to hide. He did not have a plan of what to do. After he was arrested, Luis told police he went straight from work to his home on the night of the incident, that his best guess was that his "fucking brother did a robbery," and that he did not know where his brother was. Luis denied that during the attack, the four of them—Luis, Jonathan, Uriel, and appellant—were standing around Johnson, kicking and punching him. He did not recall if he removed his McDonald's shirt during the incident.

On redirect examination, Luis testified that the events that were clearest in his mind from the night the stabbing took place or after were "[m]y brother's hand with blood; me in the bushes with the other guy; [appellant] with the knife in his lap; and Uriel just quiet all the way in the car."

Elida Campos, identified as Janet Campos by some other witnesses, testified that in January 2009, she was living with Luis, his parents, and Jonathan. She also knew Uriel and appellant. She and Luis had a child together, but they were no longer a couple. Their relationship ended poorly while he was in jail in 2009. She had had very little contact with him since then. She had seen him twice since she had moved to Southern California five years earlier. She did not love him anymore.

Early in the morning of January 3, 2009, Campos woke up when Luis came into the bedroom with Jonathan, who was bleeding from his leg and hand. She asked Luis what had happened, and he told her that after rocks fell on their car, he and appellant had chased a group of kids on foot while Jonathan and Uriel chased them in the car. Luis said that he and appellant were fighting one of the boys and that appellant "pulled a knife out and was stabbing one of the boys." Campos did not remember if the boy appellant stabbed was the same boy Luis was fighting. Luis told her that after he saw appellant

stab the kid, Jonathan "stepped in the middle between the boy and [appellant] and he raised his hands" and kept asking appellant, " 'What are you doing? What are you doing?' " Luis said that appellant then stabbed Jonathan in the leg "when he got in the middle." Jonathan was in the room during this conversation, but appellant was not, although he kept coming and going and standing by the door to her bedroom. She did not recall if appellant said anything during the conversation.

Campos and Luis tried to treat Jonathan's wounds with alcohol and cotton balls, but he ended up going to the hospital with his mother. The next day, Jonathan told Campos the boy had passed away. She felt disgusted about what had happened, putting herself in the shoes of the victim's mother. Nevertheless she did not go the police, which she now regretted. Campos initially planned to go to Mexico, and left Redwood City with Luis, Jonathan, appellant, and appellant's sister Karina in the red Honda. During the drive, they stopped at a gas station and Campos told Luis that she "didn't want to be part of this" and that she "wanted to go back home." They also discussed the stabbing and Luis said to appellant, " 'You fucked up. You fucked up. You fucked us all over.' " Appellant put his hands on his head and looked down and said, " 'I know I fucked up. I fucked up.' " After that, they turned back and went to appellant's home in Lathrop.

After they arrived in Lathrop, Campos heard appellant tell his family to gather his clothes and get rid of them or burn them. She did not see appellant burn any clothes and never saw him with a knife. Campos then drove the red Honda back to Redwood City. Before leaving Lathrop, she tried to convince Luis not to go to Mexico, saying that "if he wasn't guilty of anything, that he should stay." She also said that if he left, that would be the end of their relationship and he would not be able to see his son again.

She next saw Luis a couple of days later when he returned to Redwood City. The police came to the house a day after his return. Campos was taken to the police station but she did not tell police what she knew about the homicide because she did not want to get involved. She was testifying at trial pursuant to an immunity agreement, which protected her from the filing of new criminal charges against her.

On cross-examination, Campos acknowledged lying to police officers, pretending she did not know what they were talking about, and claiming she did not know where Jonathan was. She also acknowledged that she had obtained a restraining order against Luis in January 2010, because she was afraid of him and believed he presented a danger to her and her son. There was an incident in November 2009, when Luis followed her as she was walking home, grabbed her arm, and begged her to get back together with him. He also threatened to follow her to her boyfriend's house and said to tell her boyfriend that he should get a bulletproof vest. Luis also had verbally abused Campos during her pregnancy and had physically abused her once, dragging her from her car while accusing her of cheating. Campos had an order requiring Luis to pay support, but he had stopped paying. She had not seen Luis since he had threatened her boyfriend after his release from jail.

On redirect examination, Campos testified that she had no reason to lie to protect Luis, and would not lie to pin a murder on appellant in order to protect Luis.

Uriel Sr., testified that appellant is his brother's son. Sometime after January 3, 2009, Uriel told Uriel Sr. that he, Luis, Jonathan, and appellant had been involved in an incident in which someone had been stabbed. Uriel Sr. decided to send his son to his grandmother in Mexico, which he had already considered doing because Uriel was having troubles in school. During the drive to the border, Uriel Sr. and his family spent the night at a hotel in the Los Angeles area. While they were asleep, his three nephews—Luis, Jonathan, and appellant—knocked on the door. Uriel Sr. went into the hall and his nephews talked about the stabbing. Luis said they had been present when someone was stabbed, but he did not say who stabbed the person. After being reminded that he had testified in 2011 that Luis said that appellant did the stabbing, Uriel Sr. said he now remembered that Luis had said that appellant had the knife. During the conversation at the hotel, Jonathan said that he had also been stabbed during the fight. Appellant did not respond to anything that was said about the stabbing, but he did say he threw the knife out on the freeway. Uriel Sr. was angry with all of them about what had happened.

The next morning, Uriel Sr. drove Uriel to the border, where they met up with his nephews and crossed the border together. After they bought plane tickets to Michoacán for Uriel, Jonathan, appellant, Uriel Sr., and Luis returned to the United States. When he got back to Redwood City, Uriel Sr. lied to the police. He said that he had taken Uriel to Mexico because he was not following the rules at school. Uriel Sr. had received immunity for his testimony in 2011 and for his current testimony, to avoid prosecution for having taken his son out of the country. Uriel Sr. testified that he loved appellant and it was difficult to testify against him.

Redwood City Police Officers Russ Hughes and Jessica Gray testified that after Robert S.'s 911 call on January 3, 2009, they were separately dispatched to Franklin Street in Redwood City, where they encountered Johnson and Steven M. Steven M. was holding Johnson, who was covered in blood. Gray asked Johnson his name, and Johnson told Gray he could not talk and was having trouble breathing. She asked if he knew who had stabbed him and he said no. He said there were three to four suspects involved and when she asked if they were Hispanic, he nodded his head yes. As Gray continued to ask questions, Johnson began to lose consciousness. Paramedics arrived and began attempting to save his life. Johnson was then transported to a hospital where he was taken into surgery, but he died of his wounds.

Dr. Peter Benson, a forensic pathologist who performed the autopsy on Johnson on January 4, 2009, testified as an expert in forensic pathology. Johnson, who was 15 years old at the time of his death, died as a result of four stab wounds inflicted by a single-edged knife, which caused extensive blood loss. One stab wound went through Johnson's chest wall and into the right lung. Another wound went through soft tissue in his chest; this one was possibly a double thrust wound. Another wound went into the back of his right shoulder. Finally, one wound went into the back of his thigh. Three of the wounds were three inches deep. Dr. Benson was unable to measure the depth of the wound to the soft tissue of the chest, but it was likely several inches deep. Johnson also had less severe injuries, including a scratch and an abrasion on his forehead and a small scratch on his cheekbone, all of which could have been caused by punches or kicks to his

head. There were also multiple bruises and abrasions on his legs, which were consistent with his having been punched or kicked in the legs.

Detective Cirina, an investigator in this case, testified that on January 7, 2009, Jonathan called him, and he told Jonathan he wanted to talk to him about what had happened. Cirina said he did not know if Jonathan would be arrested for any crimes related to the homicide if he returned to the United States. Jonathan agreed to return, and Cirina interviewed him on January 13. Cirina saw a gash on Jonathan's shin and a puncture would at the base of his left thumb. Cirina interviewed Uriel a few hours later.

On January 7, 2009, police also searched Luis and Jonathan's house, where they recovered Luis's blue McDonald's uniform shirt, his black work pants, and a pair of black Nike Air Jordan shoes that Luis was wearing during the incident.[16] Two Giants jackets were also recovered. Outside of the house, police recovered a rusty folding knife, which was basically a box cutter, from a space in a brick wall. Police also located a red Honda Civic, which was impounded. The McDonald's uniform, the shoes, and the knife all tested negative for the presence of blood. On January 8, 2009, police searched appellant's family home in Lathrop. No bloody clothing or bloody folding knife was found.

Appellant was arrested in Uruapan, Michoacán, Mexico on July 28, 2009, and returned to the United States.

On January 30, 2009, Cirina obtained a DNA sample from Jonathan. He subsequently obtained DNA samples from Uriel and Luis, on December 2, 2009. Also on December 2, he spoke with Luis, who told him that when he returned to the red Honda after the incident, he entered through the rear driver's side door and sat in the rear seat, on the driver's side Appellant then entered through the same door and slid across the seat to sit in the rear passenger-side seat.

[16] These were the shoes that Robert S. testified did not look like the ones worn by the man who had kicked him in the bushes and that Luis identified from a surveillance video photo from that night as the shoes he was wearing during the incident.

Christina Richardson Jangla, a criminalist at the San Mateo County Sheriff's Office Forensic Laboratory who testified as an expert in DNA comparison and analysis, testified that she inspected the red Honda Civic on January 7, 2009. She noted damage, including scratches and a dent in the area of the right and left rear passenger doors. Jangla tested eight brown stains she found inside the car for blood. One stain on the rear driver-side interior door tested presumptively positive for blood. She then swabbed that stain for potential DNA analysis. The profiles she was able to create from the swabs contained a mixture of DNA.

Jangla testified that once DNA is deposited on a surface, there is no way of knowing how long it has been there. With a DNA mixture, it is possible for one person's DNA to be overlaid on top of another person's DNA that had previously been deposited at that location. It would not be possible from the samples to know which source of DNA was deposited first.

Andrea Weidemann was also a criminalist at the San Mateo County Sheriff's Office Forensic Laboratory who also testified as an expert in DNA comparison and analysis. She had examined the red Honda Civic for biological fluids and performed a DNA analysis comparing samples from the interior door handles of the Civic with DNA samples from Luis, Jonathan, Uriel, appellant, and Johnson. Weidemann was able to identify Luis and Jonathan as potential substantial contributors to a DNA mixture on the front driver-side interior door handle. The driver-side rear interior door handle also contained a mixture of DNA, and she was able to identify Luis as a possible substantial contributor to that profile. She was able to exclude the other subjects as possible substantial contributors, but not as possible contributors to the mixture as a whole.

Annie Ouzounian, was a former criminalist at the San Mateo County Sheriff's Office Forensic Laboratory who also testified as an expert in DNA comparison and analysis. She analyzed the DNA sample taken from the interior rear driver-side door of the red Honda Civic and was able to determine that it was a mixture of DNA from at least two individuals. She then compared that sample with known DNA samples for Johnson, appellant, Luis, Jonathan, and Uriel. She determined that both Johnson and Luis could be

included as possible contributors to the mixture, and that Luis was the major contributor and Johnson was the minor contributor. She was able to exclude Jonathan, Uriel, and appellant as contributors to the mixture. There was no way to determine whether the sample contained Johnson's blood, Luis's blood, or both. Nor did Ouzounian perform any testing to confirm the presumptive finding that the sample contained blood.

Ouzounian testified that it was possible that the amount of DNA found for Luis on the interior rear driver-side door was based on "repeated contact," by which "the DNA essentially could build up on an area." In addition, DNA can remain at a particular location for a long period of time after it was deposited. Possible sources for Luis's DNA at that location included blood, saliva, tears, or semen; all of these fluids have a high amount of DNA. Saliva can be deposited when individuals sneeze or touch their face and get saliva or other fluids on their hand and then touch the door. When she looked at a photograph of the stain on the door, Ouzounian "noticed that it wasn't a very obvious red brown stain like you would expect with a very dark blood stain," such as a blood drop. There was no way to determine how or when Luis's DNA was placed at that location.

On cross-examination, Ouzounian testified that it is a reasonable conclusion that the sample in question contained the blood of both Johnson and Luis based on the quantity of DNA in the sample. It was more likely that the DNA was from a biological fluid than from contact DNA. She believed there was human blood present in the sample, but she could not say if that was the only biological fluid present. She believed the DNA "could be blood from both individuals; or, it could be blood from one individual and another biological fluid from another."

Defense Case

Former Redwood City Police Officer Edward Feeney testified that he interviewed Robert S. on January 3, 2009. During the interview, Robert identified the driver of the car as "Gordo." He said that Gordo arrived at the scene just before he was kicked in the face and that Gordo " 'runs in and started kicking [Johnson] in the back' " while Johnson was on the ground. Robert described one of the subjects at the scene as " 'wearing a black hoodie,' " and said this subject was the second person to arrive at the scene, after

the person in a gray T-shirt and the person named Gordo. Feeney also testified that Luis said he was already in the car when appellant " 'ran back.' "

Alan Keel, the DNA technical lead analyst at a private laboratory, testified as an expert in forensic serology and DNA analysis. Keel had conducted a hemoglobin test on a sample from the stain on the rear driver-side interior door. The sample tested positive for human hemoglobin, i.e., human blood. Dr. Keel testified that there were some 20 skin cells in the sample, but "no nucleated epithelial cells that would indicate there was contribution from any other body fluid than blood," such as saliva or tears. Given that the evidence showed that there was human blood in the sample and Luis was the major contributor of DNA to the sample, Keel opined that "his DNA has to be coming from his blood." He also believed Johnson's DNA in the sample came from his blood. Sweat could not account for the quantity of Luis or Johnson's DNA found in the sample. Keel believed it was likely that the two samples were deposited at the same time, most likely through Luis transferring his own and Johnson's blood at the same time.

On cross-examination, Keel acknowledged that he could not know when the DNA of Luis and Johnson became combined or which was deposited first in the location of the stain. Nor was "there any way to know forensically when DNA was deposited at a particular location." In addition, DNA can remain in a particular location for an extended period of time and can be deposited both directly and indirectly. It was possible that Johnson's DNA was overlaid on top of Luis's DNA, which had been deposited there on a prior occasion, although that would require "Johnson's blood to have been coincidentally deposited immediately on top of [Luis's] blood." Keel had no way of knowing if Luis's blood was already at that location. In Keel's experience, he would expect to find concentrations of a person's DNA inside a car that the person frequently drove or rode in. Keel believed that the small number of nonnucleated epithelial cells in the sample eliminated the possibility that the sample came from contact DNA.

San Mateo County Probation Officer Kelly Gallagher testified that she was Luis's probation officer in January 2009. On January 5, Luis came to her office and said he wanted a travel permit to leave town, giving "some strange story about his . . . girlfriend

being stalked at the time and he needed to leave town." He "seemed agitated and demanding." Gallagher refused his request. She also told him to return the next day to discuss the matter, which he did not do.

At the conclusion of the defense case, defense counsel introduced into evidence a stipulation that Luis pleaded no contest on July 14, 2009, to a violation of section 245, subdivision (a)(1), felony assault with force likely to produce great bodily injury, and that he was sentenced on November 20, 2009, to three years of probation, which included serving one year in county jail.

Rebuttal

Detective Cirina testified that Luis was arrested on January 7, 2009. After Luis's arrest, Cirina visually inspected him for any signs of physical injuries in connection with the fight and the stabbing. Cirina looked at Luis's arms, neck, and face, and did not see any injuries.

DISCUSSION

I. *Trial Courts Failure to Instruct the Jury to View Accomplice Testimony with Caution*

Appellant contends the trial court erred when it failed to instruct the jury sua sponte that the testimony of an accomplice should be viewed with caution.

Section 1111 defines an accomplice "as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." " 'The general rule is that the testimony of all witnesses is to be judged by the same legal standard. In the case of testimony by one who might be an accomplice, however, the law provides two safeguards. The jury is instructed to view with caution testimony of an accomplice that tends to incriminate the defendant. It is also told that it cannot convict a defendant on the testimony of an accomplice alone.' [Citation.]" (*People v. Williams* (2010) 49 Cal.4th 405, 455–456 (*Williams*).) The court is required to give an accomplice instruction sua sponte if there is sufficient evidence at trial that the witness is an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.)

Here, according to appellant, Luis, Jonathan, and Uriel were accomplices as a matter of law, and the court therefore should have instructed with CALCRIM No. 335, which is given when there is no dispute regarding whether a witness is an accomplice. CALCRIM No. 335 provides in relevant part: "Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in light of all the other evidence."[17]

In this case, assuming for purposes of argument that the court erred in failing to instruct the jury that Luis, Jonathan, and Uriel were accomplices and their testimony should be viewed with caution pursuant to CALCRIM No. 335, we conclude any such error was harmless.

"Error in failing to instruct the jury on consideration of accomplice testimony at the guilt phase of a trial constitutes state-law error, and a reviewing court must evaluate whether it is reasonably probable that such error affected the verdict. [Citation.]" (*Williams, supra*, 49 Cal.4th at p. 456; accord, *People v. Mackey* (2015) 233 Cal.App.4th 32, 125 (*Mackey*).) "The purpose of the accomplice testimony rule is to ensure the jury maintains a skeptical attitude about the witness. [Citation.]" (*Mackey*, at p. 125.) "Therefore, any error in failing to give [an accomplice] instruction may be harmless if there are other circumstances which would cause the jury to mistrust the accomplice testimony . . . ." (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 26.)

For example, in *Williams*, our Supreme Court found harmless any error in failing to give an accomplice instruction regarding a witness the defendant claimed could have been liable for murder as an aider and abettor, explaining that the jury would have been inclined to view the witness's testimony with caution in any case given that it was aware

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[17] Appellant does not challenge the court's failure to give the part of the instruction that explains that an accomplice's testimony must also be corroborated. (CALCRIM No. 335 [jury may not convict defendant based on testimony "of an accomplice alone"].)

from police testimony that the witness had been arrested in connection with the murder investigation, had driven the defendant to his destination after the crime, and had testified reluctantly, under a grant of immunity. (*Williams*, *supra*, 49 Cal.4th at p. 456.) Likewise, in *People v. Mincey* (1992) 2 Cal.4th 408, 461 (*Mincey*), the trial court's failure to instruct the jury that it should view a witness's testimony with distrust was not prejudicial where it was apparent that the witness had a motive to inculpate defendant and exculpate herself, given her participation in events leading to killing and the fact that she had also been charged with murder. Moreover, in closing argument the prosecutor said that he did not believe everything the witness had said was true and that it was for the jury to determine her credibility. (*Ibid.*; see also *People v. Miranda* (1987) 44 Cal.3d 57, 101 [any instructional error was harmless where "jury had before it ample information suggesting that [witness's] testimony may not have been completely trustworthy," including his testimony that he had previously lied about his own involvement in killing and that he was given a reduced sentence in exchange for his testimony], disapproved on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4; *Mackey*, *supra*, 233 Cal.App.4th at p. 125 ["jury was made well aware of [witness's] past criminality; his central violent role in the current crimes; his conflicting stories after his arrest; his possible motive to lie in order to improve his own sentencing prospects; and his possible grudges against [defendants]"; moreover, "prosecutor by no means whitewashed [witness] before the jury"].)

Here, the jury was aware that Luis, Jonathan, and Uriel were present at the attack and fled, together with appellant, to Mexico. (See *Williams*, *supra*, 49 Cal.4th at p. 456; *Mincey*, *supra*, 2 Cal.4th at p. 461.) In addition, the evidence showed that they had all lied to police and perjured themselves before the grand jury about their involvement in the attack and/or fleeing to Mexico. (See *People v. Miranda* , *supra*, 44 Cal.3d at p. 101.) The jury was also aware that the three men had been granted immunity. (*Williams*, at p. 456; *Miranda*, at p. 101.) Finally, during closing argument, both the prosecutor and defense counsel discussed the fact that all three of these witnesses were involved to some degree in the offense, had lied to police, had committed perjury, and were testifying

pursuant to immunity agreements. (See *Mincey, supra,* 2 Cal.4th at p. 461; *Mackey, supra,* 233 Cal.App.4th at p. 125.)[18]

Thus, the jury had abundant information suggesting that the testimony of Luis, Jonathan, and Uriel was not completely trustworthy and should be viewed with caution. It is therefore not reasonably probable that the result would have been different had the court instructed the jury with CALCRIM No. 335. (See *Williams, supra,* 49 Cal.4th at p. 456.)

II. *Admission of Jonathan's Testimony Regarding Appellant's Father's Request that He Keep Silent*

Appellant contends the court erred **and violated the confrontation clauses of the** California and United States Constitutions when it admitted Jonathan's testimony that appellant's father had told him to keep silent about the killing.

A. *Trial Court Background*

Before trial, defense counsel moved in limine to exclude Jonathan's expected testimony that appellant's father "told him in the residence in Gilroy not to say anything about what 'Luis Villa had done.' " In the motion, counsel argued that appellant's father's statement constituted hearsay, lacked foundation, and was irrelevant. The

[18] Indeed, during closing argument, the prosecutor told the jury, "There's an old adage in criminal justice that crimes conceived in hell don't have angels as their witnesses. And there's no question that each of the witnesses in this case all have various issues. [¶] . . . [¶] I would love to have a case where Matthew Johnson's murder was witnessed by a few school teachers, a priest, and a couple of nuns to present them to you. I wish that was the evidence that I have, but you take your witnesses as you find them. And when you're dealing with things like murder in this sort of situation, some of the witnesses you're going to have are going to be people that were involved to some degree. And clearly, the Herreras and Uriel Villa, Jr., were involved. No question about it. [¶] . . . It's up to you to determine whether or not you find them to be credible and why." (See *Mincey, supra,* 2 Cal.4th at p. 461 [prosecutor stated it was for jury to determine witness's credibility]; *Mackey, supra,* 233 Cal.App.4th at p. 125 [prosecutor described witness claimed to be accomplice as, inter alia, " 'not exactly the person that a district attorney wants to have as their main witness,' . . . but 'sometimes you have to make a deal with a demon to get the devil' "].)

prosecutor countered that the statement was not hearsay because it was not intended to show the truth of any fact, but instead to show its effect on Jonathan.

At a hearing on the motion, the court found that the statement was not hearsay because "it's offered as the words spoken, but not for the truth of the matter asserted." When defense counsel said the statement was not relevant because Jonathan had already decided to flee to Mexico and to not say anything about what had happened, the court initially responded that it could not determine relevance until Jonathan testified about whether or not the statement "affected him in any way." The court also told defense counsel he could ask Jonathan on cross-examination about whether he had already made the decision to flee to Mexico or to not tell anyone what had happened before hearing the statement. The prosecutor then said appellant's father's statement was relevant to show that appellant's "family is exerting pressure on [Jonathan] not to come forward and say anything about what he knows about what happened." After further discussion, the court found that the statement was relevant.

In his opening statement, the prosecutor told the jury that it was "going to hear testimony from Jonathan Herrera that [appellant's] father told him, 'Don't speak to anyone about what Luis Villa did. Say nothing,' " and that Jonathan "felt pressured by that statement."

During the direct examination of Jonathan, the following exchange took place between him and the prosecutor.

"Q. Now, when you were at the residence in Gilroy, did [appellant's] father say anything to you about the stabbing?

"A. Yes, he did."

At that point, defense counsel objected, stating, "Hearsay and [Evidence Code section] 402." The court overruled the objection, and the prosecutor resumed the examination.

"Q. What did [appellant's] father say to you?

"A. He told me not to tell anybody about what had happened.

"Q. Did he say anything specifically about [appellant]?

"A. Yes.

"Q. What did he say?

"A. He said that [appellant] is like my brother; that I shouldn't say anything to anybody about what had happened.

"Q. How did that make you feel when [appellant's] father told you that?

"A. Made me feel pressured.

"Q. In what way?

"A. Like, pressure, like, you know, like, I don't know. Like, some kind of pressure. Like, I couldn't do anything about it. Like, I have to leave; you know?

"Q. How did you feel about going to Mexico at that point?

"A. I mean, scary. But, I mean, I felt like it was the only way out of everything.

"Q. Did you want to go?

"A. No.

"Q. Did you love your uncle?

"A. Yeah."

The prosecutor did not refer to Jonathan's testimony about the statement by appellant's father during closing argument.

B. *Legal Analysis*

1.

"[A]n out-of-court statement is hearsay only when it is 'offered to prove the truth of the matter stated.' [Citation.] Because a request, by itself, does not assert the truth of any fact, it cannot be offered to prove the truth of the matter stated. [Citations.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 117 (*Jurado*), citing, inter alia, *People v. Reyes* (1976) 62 Cal.App.3d 53, 67 [" 'words of direction or authorization do not constitute hearsay since they are not offered to prove the truth of any matter asserted by such words' "].)

Here, appellant's father's statement to Jonathan not to tell anyone what had happened was plainly a direction or request, admitted to show its effect on Jonathan. (See *Jurado, supra*, 38 Cal.4th at p. 117.) Jonathan in fact testified to the effect of the statement: even though he did not want to go to Mexico, appellant's father's statement

made him feel pressured, "like [he] couldn't do anything about it" and "[l]ike [he had] to leave."

In his reply brief, appellant attempts to distinguish *Jurado* by arguing that "[t]his case is different, because the supposed words of direction contained implied hearsay that appellant made an incriminatory admission." Although appellant cites no case to support this claim, we observe that in *People v. Garcia* (2008) 168 Cal.App.4th 261, 289 (*Garcia*), the appellate court stated that a declarant's words of direction can be *implied* hearsay " 'if such evidence is offered to prove—not the truth of the matter that is stated in such statement expressly—but the truth of a matter that is stated in such statement by implication.' [Citations.]" The *Garcia* court explained: " 'An implied statement may be inferred from an express statement whenever it is reasonable to conclude: (1) that declarant *in fact intended* to make such implied statement, or (2) that a recipient of declarant's express statement would *reasonably believe* that declarant intended by his express statement to make the implied statement.' [Citation.]" (*Ibid*.)

In the present case, we do not believe that it can reasonably be inferred from appellant's father's statement either (1) that he intended to imply that appellant had told him that he stabbed Johnson, or (2) that Jonathan believed that appellant's father intended to make such an implied statement. (See *Garcia*, *supra*, 168 Cal.App.4th at p. 289.) Moreover, even assuming appellant's father intended to imply by his statement that he believed appellant was involved in the attack and, therefore, the statement *was* implied hearsay, we find any error by the court in admitting this evidence harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *Garcia*, at pp. 291–292 [applying state law standard of error; federal constitutional standard was not applicable since confrontation clause is implicated only by testimonial hearsay].)

First, Jonathan's testimony on this point was brief and minimal in the context of this lengthy trial involving hundreds of pages of testimony. Second, even if the testimony implied that appellant's father believed appellant was involved in the attack, based on something he overheard or was told during one of the many conversations about the stabbing among family members (see pt. II.B.2), there was extensive other—and

much stronger—testimony, not only by the three witnesses who were also present at the scene, but also by Campos and Uriel Sr. regarding appellant's use of a knife in the attack and/or his post-attack admissions that he had done so. For example, Jonathan testified that, not only did he see appellant stabbing Johnson, but that appellant also stabbed him, which required a trip to the hospital. Uriel Jr. testified that he heard appellant say he was going to stab Johnson, and Luis, Uriel, and Jonathan all testified that they saw appellant with the knife in the car after the attack, where he also admitted stabbing Johnson. Accordingly, considering the quantity of evidence implicating appellant in the stabbing, it is not reasonably probable that a result more favorable to appellant would have been reached had this statement been excluded. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Appellant further argues that the court erred in failing to instruct the jury sua sponte with the third paragraph of CALCRIM No. 371, which provides in relevant part: "If someone other than the defendant tried to . . . conceal or destroy evidence, that conduct may show the defendant was aware of (his/her) guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions." The court did instruct the jury with the first paragraph of CALCRIM No. 371, which states, "If the defendant tried to hide evidence, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance; however, evidence of such an attempt cannot prove guilt by itself."[19] Apparently, the prosecutor had originally requested that the court also instruct the jury with the third paragraph of CALCRIM No. 371, but during a discussion with the court and defense counsel, the prosecutor withdrew his request for that portion of the instruction. The court responded, "That would have been my ruling in any event. I didn't see anything that really substantiated that." The court therefore said it

[19] During closing argument, the prosecutor discussed this paragraph of the instruction in connection with the evidence regarding appellant's decisions to tear Jonathan's pants, ask his family to burn the clothes he had worn during the incident, and dispose of the knife he had used to stab Johnson.

would give only the first paragraph of the instruction. There was no objection or comment by defense counsel during this discussion.

Although defense counsel did not request that the court instruct with the third paragraph of CALCRIM No. 371, appellant asserts in his reply brief that the issue is not forfeited because the court did instruct the jury with the first paragraph of CALCRIM No. 371, and it therefore had a duty to instruct correctly on that topic, which required it to include the third paragraph. (See *People v. Townsel* (2016) 63 Cal.4th 25, 58 [noting that defendant "relies on the principle that once a trial court undertakes to instruct on a legal point, it must do so correctly"].) Even assuming the contention is not forfeited, as we shall explain, we find it to be without merit.

Appellant asserts that an instruction telling the jury that it could hold him responsible for his father's "threat" to Jonathan only if he authorized it was necessary because "the logical inference for the jury to make from the threat was that appellant had admitted the crime to his father." However, this is mere speculation on the part of appellant. There was no evidence that appellant was present when his father spoke or that he had asked his father to make the statement to Jonathan, and the prosecutor did not argue that the statement reflected appellant's consciousness of guilt. Moreover, in terms of inferences the jury might make, as noted, the evidence shows that there were conversations among various people about the stabbing and several other ways appellant's father could have learned of appellant's involvement. For example, he could have been told about it by Jonathan, Luis, or appellant's sister Carina, or could have simply overheard a discussion of the stabbing while at the house in Gilroy. Thus, in addition to the fact that the statement was not hearsay and was offered only to show its effect on Jonathan, there is no basis for believing the jury would assume that appellant had authorized his father to speak to Jonathan on his behalf, given the lack of evidence supporting such an assumption.

Consequently, the court did not err when it failed to instruct sua sponte with the third paragraph of CALCRIM No. 371, after finding that it was inappropriate considering the evidence in the case. (Cf. *People v. Bell* (2004) 118 Cal.App.4th 249, 256 [while a

jury may be told that an attempt to fabricate evidence "*by the defendant* may show a consciousness of guilt," "such an instruction is improper if the only evidence is that a third party made such an attempt, unless the evidence would also support a conclusion the defendant authorized the third party's action"].)

III. *Trial Court's Instruction to the Jury When It Deadlocked*

Appellant contends the court erred when it instructed the jury with CALCRIM No. 3551 after the jury said it was deadlocked.

A. *Trial Court Background*

The trial in this case, from opening statements through closing arguments, lasted for approximately nine days. After the fifth day of jury deliberations, the judge (Honorable Barbara J. Mallach), who was to be absent from court for the following 10 days, informed the jury that there would be another judge available to supervise deliberations during her absence.

On the afternoon of the following day—the sixth full day of jury deliberations—the jury sent the substitute judge (Honorable Steven L. Dylina) a note indicating that "we're a hung jury." Judge Dylina told the jury that "Judge Mallach wanted me to read one more instruction and ask you to try to continue your deliberations and let me know where you're at." The judge then instructed the jury with CALCRIM No. 3551, as follows.

"Sometimes juries [that] have difficulty reaching a verdict are able to resume deliberations and successfully reach a verdict on one or more counts.

"Please consider the following suggestions; do not hesitate to re-examine your own views. Fair and effective jury deliberations require a frank and forthright exchange of views. Each of you must decide the case for yourself and form your individual opinion after you have fully and completely considered all the evidence with your fellow jurors.

"It is your duty as jurors to deliberate with the goal of reaching a verdict; if you can do so; without surrendering your individual judgment. Do not change your position just because it differs from that of other jurors or just because you . . . or others want to

reach a verdict. Both the People and defendant are entitled to the individual judgment of each juror.

"It is up to you to decide how to conduct your deliberations. You may want to consider new approaches in order to get a fresh perspective. Let me know whether I can do anything to help you further, such as give additional instructions or clarify instructions that I; or, in this case, Judge Mallach; have already given you.

"Please continue your deliberations at this time. If you wish to communicate with me further, please do so in writing and give it to the bailiff as you've done in the past.

"So I'd like you to at least go back and continue your deliberations. And if you need anything further from me, please don't hesitate to let me know."

After the jury left the courtroom, defense counsel placed an objection on the record, indicating that he had previously indicated to Judge Mallach that he would object to that instruction, and she had overruled the objection. Counsel then said he believed that the instruction "just pressures the jury that is hung and that the court should just proceed to the inquiry of a hung jury without giving that instruction." Judge Dylina responded, "I was required to give the instruction by Judge Mallach so I'm following Judge Mallach's instructions. She's been with you from the very beginning. It's one of the finest jurors [*sic*] I've ever met. I'm going to defer to her judgment. . . ."

The following afternoon, the jury reached a verdict, finding appellant guilty of second degree murder and finding true the allegations that he had personally used a deadly weapon during the offense and that he was at least 16 years of age at the time of the offense.

B. *Legal Analysis*

"Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." (§ 1140.) "[W]hen a jury informs the trial court it has reached an impasse, the trial court 'must do more than figuratively throw

up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury.' [Citation.]" (*People v. Salazar* (2014) 227 Cal.App.4th 1078, 1086, quoting *People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

1. *CALCRIM No. 3551*

In *People v. Gainer* (1977) 19 Cal.3d 835 (*Gainer*), disapproved on another ground by *People v. Valdez* (2012) 55 Cal.4th 82, 163, our Supreme Court addressed the permissible limits of a trial court's instruction encouraging deadlocked jurors to attempt to reach a verdict. The court held that "it is error for a trial court to give an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion of the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried." (*Gainer*, at p. 852, fn. omitted.) The *Gainer* court disapproved of the so-called "*Allen* charge" or "dynamite" instruction—approved by the United States Supreme Court in *Allen v. United States* (1896) 164 U.S. 492—which was used as a means of " 'blasting' a verdict out of a deadlocked jury." (*Gainer* at pp. 842–843.) Because such an instruction tells "the jury to consider extraneous and improper factors, inaccurately states the law, carries a potentially coercive impact, and burdens rather than facilitates the administration of justice, [the court] conclude[d] that further use of the charge should be prohibited in California." (*Ibid.*)

In *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118–1120 (*Moore*), the appellate court upheld an instruction similar to the one given in this case after the jury stated it could not reach a verdict following one day of deliberations. The court rejected the same arguments appellant makes here—that the instructions were coercive and improper—and instead commended the trial court "for fashioning such an excellent instruction." (*Id.* at p. 1122.) The court also found that the supplemental instructions were not improper under *Gainer*. (*Moore*, at pp. 1120–1121.)

Appellant suggests that *Moore* was wrongly decided and "warrants re-examination," and further argues that CALCRIM No. 3551 does in fact violate *Gainer*.

Appellant first claims that the part of CALCRIM No. 3551 that states, "Do not hesitate to re-examine your views" is equivalent to the improper admonition given in *Gainer* that "a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one." (*Gainer*, *supra*, 19 Cal.3d at p. 848.) Appellant is incorrect. Unlike the instruction disapproved in *Gainer*, CALCRIM No. 3551 does not mention the existence of a majority and minority position or put pressure on minority jurors to agree with the majority opinion. (See *Gainer*, at p. 852.) Instead, it admonishes the jurors not to "change your position just because it differs from that of other jurors or just because you . . . or others want to reach a verdict. Both the People and defendant are entitled to the individual judgment of each juror." (CALCRIM No. 3551; cf. *People v. Valdez, supra,* 55 Cal.4th at pp. 160, 162 [instruction telling jurors in both "the minority" and "the majority" to "reweigh your positions" "did not in any way single out minority jurors" or "encourage jurors in the minority to abandon their independent judgment and acquiesce in a verdict simply because the majority had reached a verdict"].)

Appellant also claims that the part of CALCRIM No. 3551 that states, "It is your duty to deliberate with goals of reaching a verdict, if you can do so without surrendering your individual judgment" is the equivalent of the language disapproved in *Gainer*, that "[y]ou should consider that the case must sometime be decided." (*Gainer*, *supra*, 19 Cal.3d at p. 851.) Again, appellant is incorrect. Unlike the improper instruction given in *Gainer*, there was no language in the instruction given here informing the jury that a failure to reach a verdict would necessarily result in a retrial. It simply asked jurors to continue their deliberations in an effort to reach a verdict, but only to the extent they could do so "without surrendering [their] individual judgment." (CALCRIM No. 3551; see *People v. Virgil* (2011) 51 Cal.4th 1210, 1280, 1282 [it was not coercive for court to instruct jury that it "must make every effort to reach [a] unanimous verdict if at all possible" in response to jury's question about what would happen if it was unable to reach a unanimous decision]; *People v. Butler* (2009) 46 Cal.4th 847, 884 [court properly instructed deadlocked jury "to pursue 'the purpose of reaching a verdict, *if you can do so*,' and that it was their 'duty to decide the case, *if you can conscientiously do so*' "].)

Hence, the court properly instructed the jury with CALCRIM No. 3551, which, unlike the instruction disapproved in *Gainer*, did *not* ask "the jury to consider extraneous and improper factors, inaccurately [state] the law, [or carry] a potentially coercive impact." (*Gainer, supra,* 19 Cal.3d at pp. 842–843; see *Moore, supra,* 96 Cal.App.4th at pp. 1120–1121.)[20]

2. *California Rules of Court, Rule 2.1036*[21]

Appellant next argues that even if the court properly instructed the jury after it declared it was hung, the court should not have given CALCRIM No. 3551 before further inquiring into the jury's deadlock. Specifically, he asserts that the court was required to follow rule 2.1036(a), which states in relevant part: "After a jury reports that it has reached an impasse in its deliberations, the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. *The judge should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict*." (Italics added.)[22] According to appellant, the court in this case should have followed the admonition in the italicized portion of rule 2.1036(a), above. He asserts that his "right to have proper inquiry made of the jury was lost in the transition between Judge Mallach and Judge Dylina" and that neither judge properly exercised his or her discretion in determining whether to deliver CALCRIM No. 3551.

First, Judge Mallach, who overruled defense counsel's objection and decided to instruct the jury with CALCRIM No. 3551 if it reached an impasse, had been with the

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[20] Having concluded that the trial court properly instructed the jury with CALCRIM No. 3551, we reject appellant's claim that the instruction violated his due process and unanimous jury trial rights under the California Constitution and the due process clause of the United States Constitution.

[21] All further rule references are to the California Rules of Court.

[22] Rule 2.1036(b) states: "If the trial judge determines that further action might assist the jury in reaching a verdict, the judge may: [¶] (1) Give additional instructions; [¶] (2) Clarify previous instructions; [¶] (3) Permit attorneys to make additional closing arguments; or [¶] (4) Employ any combination of these measures."

jury throughout the trial. She had responded to the many questions the jury asked over the course of the first five days of deliberations. On the sixth day, just after Judge Dylina took over for Judge Mallach, the jury declared itself "hung" and Judge Dylina properly gave the instruction that Judge Mallach had, in her discretion, determined would be appropriate.

Second, nothing in rule 2.1036 *requires* the court to inquire whether the jury has specific concerns before giving an instruction on attempting to overcome the impasse. (See *People v. Salazar, supra,* 227 Cal.App.4th at p. 1088 ["While rule 2.1036 does not state so expressly, it is apparent the trial court has discretion when choosing whether to resort to the tools provided and how to use those tools"]; see also *People v. Bell* (2007) 40 Cal.4th 582, 616–617 [concluding that "the denial of a mistrial without further inquiry was not an abuse of discretion"; "[w]hile the trial court has a duty to avoid coercing the jury to reach a verdict, we have held that inquiry as to the possibility of agreement is 'not a prerequisite to denial of a motion for mistrial.' "], disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)[23]

There was no error pursuant to rule 2.1036.[24]

IV. *The Prior Conviction Findings*

Appellant contends the court's true findings on allegations related to his prior conviction should be reversed and remanded for resentencing pursuant to subsequent California case law. Respondent agrees.

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[23] Also, in giving CALCRIM No. 3551, Judge Dylina did inform the jury to "[l]et me know whether I can do anything to help you further, such as give additional instructions or clarify instructions that I; or, in this case, Judge Mallach; have already given you" and that "if you need anything further from me, please don't hesitate to let me know."

[24] Appellant argues that even if any one of these three alleged trial court errors (see pts. I., II., & III., *ante*) did not prejudice him, the judgment should nonetheless be reversed based on the cumulative prejudice of the errors. (See *People v. Hill* (1998) 17 Cal.4th 800, 844.) In light of our resolution of the issues, there is no ground for reversal based on cumulative error.

A. *Trial Court Background*

The information alleged that appellant had a prior conviction from 2008 for negligent discharge of a firearm (§ 246.3) and that that conviction was a serious felony under section 667, subdivision (a)(1) and a strike under section 1170.12, subdivision (c)(1). The offense could only qualify as a serious felony or strike, however, if appellant had "personally use[d] a firearm" during its commission. (§ 1192.7, subd. (c)(8); see §§ 667, subd. (a)(4); 1170.12, subd. (b)(1).)

Appellant waived his right to a jury trial on the prior conviction allegations. Before the court trial, defense counsel objected to the court determining whether appellant's prior conviction for negligent discharge of a firearm was a serious felony or a strike because appellant "was denied a determination by the jury which tried the issue of [his] guilt or innocence on the underlying charge regarding whether he personally used a firearm during the commission of the offense as required by . . . section 969f, an alternate theory was available to the jury because an aiding and abetting instruction was given regarding the charge, and it is a due process violation and violation of [appellant's] right to a jury trial for the court to now make a subsequent determination regarding whether [appellant] personally used a firearm during the commission of the offense."

At the court trial, following argument of counsel, the court took the defense objection under submission. On April 13, 2017, the court ruled that it did have the power to make the prior strike and prior serious felony conviction findings. It then found both of the allegations true.[25] At sentencing, the court doubled appellant's 15-year-to-life sentence for second degree murder based on the prior strike and added a five-year enhancement based on the prior serious felony.

B. *Legal Analysis*

In December 2017, after appellant's trial, our Supreme Court in *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), disapproved prior case law, including *People v. McGee* (2006) 38 Cal.4th 682, 706, which had "held that the Sixth Amendment permits

[25] The court also found true the prior prison term allegation.

courts to review the record of a defendant's prior conviction to determine whether the crime qualifies as a serious felony for purposes of the sentencing laws." (*Gallardo*, at p. 124.) Based on the reasoning of recent United States Supreme Court cases (*Mathis v. United States* (2016) 579 U.S. ___ [136 S.Ct. 2243]; *Descamps v. United States* (2013) 570 U.S. 254; see also *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490), the *Gallardo* court held that "[w]hile a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea, the court may not rely on its own independent review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Gallardo*, at p. 124.) The court further held that upon finding that a trial court has improperly "determine[d] disputed facts about what conduct likely gave rise to the conviction," the reviewing court should remand the matter to permit the trial court to make the relevant determinations, based on the record, about whether the relevant facts were either found by a jury or admitted by the defendant. (*Id.* at p. 138.)

Here, the jury in the prior case made no specific finding as to whether appellant had personally used a firearm. Because another defendant had been charged in the same count with the same offense and the jury had been instructed on aider and abettor liability, it was possible that the jury had found appellant guilty of the offense without also concluding that he had personally used a firearm. Consequently, since the record of conviction did not reflect any factual finding on the part of the jury as to appellant's personal use of a firearm, the trial court in this case improperly "determine[d] disputed facts about what conduct likely gave rise to the conviction" in finding true the prior serious felony and strike allegations. (*Gallardo, supra*, 4 Cal.5th at p. 138.) Because this determination violated the rule set forth in *Gallardo*, the matter must be remanded for a new determination on the prior conviction allegations. (See *ibid.*)[26]

[26] Appellant asserts that remand is unnecessary because the record in the prior case reflects that the jury affirmatively found that appellant *did not* personally use a firearm in that offense. However, the jury made the so-called finding that appellant did not personally use a firearm on a verdict form for attempted voluntary manslaughter, a lesser

DISPOSITION

We reverse the trial court's prior conviction findings and remand the matter for a new court trial on the prior conviction allegations and for resentencing, consistent with this opinion and *Gallardo, supra,* 4 Cal.5th 120. In all other respects, the judgment is affirmed.

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Kline, P.J.

We concur:

_____
Richman, J.

_____
Stewart, J.

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included offense to another count, of which the jury did not find appellant guilty. As the prosecutor stated during the court trial on the prior conviction allegations, "The jury cannot make a finding on an enhancement when they do not find the defendant guilty of the underlying crime. And so any argument by the defense that somehow . . . the jury in that case reached a finding that they could not reach is irrelevant."

People v. Villa (A152278)